Durham University

Durham Research Online

Deposited in DRO:

02 March 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Not peer-reviewed

Citation for published item:

Bohlander, Michael (2016) 'Article 36. Qualifications, nomination and election of judges.', in Rome Statute of the International Criminal Court : a commentary. Munich ; Oxford ; Baden-Baden: C.H. Beck ; Hart ; Nomos, pp. 1216-1225.

Further information on publisher's website:

http://www.beck-shop.de/Triffterer-Commentary-on-Rome-Statute-of-International-Criminal-Court/productview.aspx?product=11751710

Publisher's copyright statement:

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a link is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the full DRO policy for further details.

Durham University Library, Stockton Road, Durham DH1 3LY, United Kingdom
Tel : +44 (0)191 334 3042 | Fax : +44 (0)191 334 2971
https://dro.dur.ac.uk

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b).

In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;
(ii) Equitable geographical representation; and
(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Bibliography

Ambos, Book Review: International Courts and Their Judges, (2012) 23 CRIM L. FORUM 223; Bassiouni, *The Legislative History of the International Criminal Court*, Vol.2, (2005) and Vol.3, (2005); Bohlander, The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics, in *id.* (ed.), *International Criminal Justice – A Critical Analysis of Institutions and Procedures* (2007); *id.*, Pride and Prejudice or Sense and Sensibility? A pragmatic proposal for the recruitment of judges at the ICC and other international criminal courts, (2009) 12 NEW CRIM L. REV. 529; *id.* No Country for Old Men? – Age limits for judges at international criminal tribunals, (2010) 1 Indian Yearbook of International Law and Policy 327; *id.*, Language, culture, legal traditions and international criminal justice, (2014) *Journal of International Criminal Justice* 491; *id.*, Criminalising LGBT persons under national criminal law and Article 7(1)(h) and (3) of the ICC Statute (2014) Global Policy (forthcoming – early view DOI: 10.1111/1758-5899.12136); Bohlander and Findlay, The use of domestic sources as a basis for international criminal law principles, (2002) 1 The Global Community: Yearbook of International Law and Jurisprudence 3; Cassese et al. (eds.), *The Rome Statute of the International Criminal Court – A Commentary*, Vol. I, (2002); Ingadottir, *The International Criminal Court: Recommendations on Policy and Practice* (2003); Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999); Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010)

Contents

A. Paragraphs 1 and 2: Composition of the Chambers (1 – 2)
B. Paragraph 3 – Qualifications of judicial candidates (3 – 8)
C. Paragraph 4 – Nomination Procedure; Advisory Committee (ACN) (9 – 10)
D. Paragraphs 5 to 8 – Election procedure; gender balance (11 – 12)
E. Paragraphs 9 and 10 – Term of office; continuation in office (13 – 14)

A. Paragraphs 1 and 2: Composition of the Chambers

The ICC's regular complement comprises 18 judges to serve in the Trial and Appeals Chambers. This number may be augmented if "necessary and appropriate" circumstances, presumably mainly[1] the development of the Court's case load (*argumentum e contrario* from paragraph 2(c)(ii)), so require[2]. The procedure for increasing the numbers on the bench is set out in paragraph 2, which is self-explanatory. At the time of writing, however, no such increase had ever been applied for by the Presidency, despite several requests by individual judges to be unassigned from sitting on certain cases because of personal docket overload[3]. The length of the 1

[1] It is, however, imaginable that other reasons might be adduced, such as for example, a need for an injection of specific cultural and linguistic competences for a certain situation or case, similar to the expertise on issues such as violence against women and children in paragraph 8(b).

[2] The view expressed in the previous edition of this Commentary at marginal number 3 and fn. 12 that this equals a simplified procedure for amending the Statute is herewith abandoned, since the Statute itself already allows for the variation in the number of judges - paragraphs 1 and 2 do not stand in a hierarchical relationship to each other but must be read together: Paragraph 1 is not *amended* by increasing the number of judges under paragraph 2; if anything, the normative reach and content of paragraph 1 is generally qualified *ab initio* by paragraph 2. Similarly, Rwelamira, in: Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 155.

[3] See e.g. *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V(b), 30 January 2014; *The Prosecutor v William Samoei Ruto and Joshua Arap Sang and The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-01/11 & ICC-01/09-02/11, Decision replacing a judge in Trial Chamber V, 26 April 2013; *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08, Decision replacing judges in Trial Chamber III, 20 July 2010; *The Prosecutor v German Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision replacing a judge in Trial Chamber II, 30 September 2009 and ICC-01/05-9-Anx2, Decision on the request to be excused from the exercise of judicial functions in Pre-Trial Chamber III, 22 April 2008.

proceedings before the Trial and Appeals Chambers and especially the time that the accused must spend in custody has reached the levels previously encountered at the ICTY and ICTR, a state of affairs which has persistently caused human rights concerns. There are thus already indications that the current staffing of the ICC bench may not be adequate. The experience from the ICTY and ICTR, firstly with the increase of the number of Trial Chambers and the augmentation of the joint Appeals Chamber and the attendant number of permanent judges, and secondly with the introduction of ad-litem judges in 2001 as part of their completion strategy, should be cause for concern and suggest a pro-active and robust approach to the problem of under-staffing, not least given the fact that even after the increases in judicial numbers just mentioned, both ad hoc tribunals continued to struggle with the case load and length of proceedings[4].

Given that paragraph 2 also allows for decreasing the number of the supernumerary[5] judges once the circumstances justifying a larger number have ceased to exist, the creation of a rapid response mechanism such as, for example, a reserve pool of qualified candidates[6] who could be called upon at short notice, would seem advisable. There will be more suitable candidates in almost any election than vacant seats; hence the ASP might consider adding a procedure for the establishment of a reserve list to Art. 36 under the same criteria (experience, geographical distribution and sex) that apply to the regular elections. One way of doing so could be to elect (at least) one qualified reserve judge for every permanent seat; this could also at the same time lead to a more efficient way of filling casual vacancies under Art. 37; unlike the practice at the ad hoc tribunals where the state of the judge whose departure etc. caused the vacancy was given the prerogative of unilaterally nominating the successor, Art. 37 provides for no such approach. 2

B. Paragraph 3 – Qualifications of judicial candidates

The qualification of judicial nominees has been one of the most contentious aspects at each of the modern international criminal tribunals, starting with the ICTY and ICTR. While "moral character" has so far not been a live issue, as far as can be seen, the criterion of being qualified for the highest judicial offices in the domestic environment has given rise to a number of challenges, albeit not at the ICC. As a preliminary (and admittedly somewhat academic[7]) matter, it bears reminding oneself that since a State Party can nominate a candidate of another State Party[8] under paragraph 4(b) and (c), there is a possibility that State Party A nominates a candidate from State Party B who may qualify for the highest judicial offices under the latter's domestic law, but not under the former's. The meaning of the term "qualifications … for appointment highest judicial office" also varies rather widely[9] as is best explained at the example of the first ICC judge from Japan[10]. The qualifications need to exist during the entire term of office and according to the case law of the *ad hoc* tribunals their loss will lead to the loss of the judicial seat itself[11]. There is, however, some uncertainty over the question of whether an elected judge of the ICC who does not meet the criteria can or must be removed from office[12]. 3

The development of the law on the issue of qualifications was highly controversial[13]. Article 6 of the ILC Draft stated that candidates should have "in addition: (a) criminal trial experience; (b) recognized competence in international law", i.e. a cumulative requirement. The ad-hoc committee of the 1996 Preparatory Committee, under para. 20 of its report, stated that 'concerning the appointment of the prosecutor, expertise in the investigation and prosecution of criminal cases was considered to be an important requirement', but that insisting on criminal or international law experience with the judges was seen by some as 'unduly restricting the sources of expertise on which the court should be able to rely'. The meaning of 'sources of expertise' may be illustrated by comments made by Algeria, Egypt, Jordan, Kuwait, Libya and Qatar at the 1996 Prep 4

[4] It is obvious that the main factors militating against such a pragmatic approach are budget considerations.
[5] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 531; Rwelamira, in Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 155.
[6] See in this context Bohlander (2009) 12 NEW CRIM L. REV. 529; *id.* (2010) 1 Indian Yearbook of International Law and Policy 327.
[7] But see e.g. on the circumstances of the judicial candidature in 2013 of the then Chef de Cabinet at the ICTY who had no prior judicial experience at all: www.diplomatmagazine.nl/2013/11/03/gabrielle-mcintyre-judicial-candidate-icty-election/ and www.sense-agency.com/icty/togolese-judge-elected-to-tribunal%E2%80%99s-appeals-chamber.29.html?news_id=15507.
[8] This possibility was already considered during the early drafting history of the provision. See Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 529.
[9] Bohlander, in: *id.* (ed.), *International Criminal Justice - A Critical Analysis of Institutions and Procedures* (2007) 325.
[10] See Bohlander (2009) 12 NEW CRIM L. REV. 529.
[11] See on the related ICTY jurisprudence Bohlander (2010) 1 Indian Yearbook of International Law and Policy 327.
[12] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532 appears to take the view that an "independent removal procedure" is not provided for in such a case, and also extends that to the language command issue – after all a serious matter in the daily court practice. This is *prima facie* supported by the absence of such an alternative in Art. 46(1); in any event the rare case of a candidate who intentionally lied about her qualifications may be found to constitute "serious misconduct" under Art. 46(1)(a). The Statute does not seem to allow for a removal if the deception was, for example, committed by the nominating State authorities without the collusion of the candidate. It is nonetheless disconcerting to think that a judge who does demonstrably not meet the criteria should be allowed to remain in office. The Statute is in need of amendment in this regard.
[13] See on the following and the relevant sources Bohlander (2009) 12 NEW CRIM L. REV. 529 from which parts have been excerpted and modified.

Comm: "Experience in criminal matters (judicial prosecutorial or defence advocacy) is, in part, necessary, but not to the exclusion of other expertise. The words of article 6 '…for appointment to the highest judicial offices…' are too limiting since most legal systems do not have judicial appointments by career judges. The present formulation means that only career judges are eligible, and therefore, this formulation should be changed." The United Kingdom argued for the phrase "criminal trial experience *and*, where possible, recognized competence in international law", a common-sense approach to the necessities of judging, whether in a domestic context or in the international arena. Many delegates of the 1998 Diplomatic Conference thought that trial experience should be required for the pre-trial and trial chamber judges. The insistence on previous practical experience together with or as an alternative to competence in international law can be found in the proposals of Switzerland, Portugal, Singapore, Trinidad and Tobago, the United States and France at the 1996 Prep Comm. Article 30[6] of the 1998 Zutphen Draft was an expression of the range of opinions which affected the negotiations; draft Article 37 submitted to the Rome Conference by the 1998 Prep Comm in A/CONF.183/2/ Add.1 read:

> 3. The judges of the Court shall:
> (a) be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]
> (b) have:
> (i) [at least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]
> (ii) recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] [; and (c) possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].

The text of draft Article 37 transmitted by the Drafting Committee to the Committee of the Whole contained a reference to competence in criminal law and procedure gained through judicial or prosecutorial as well as defence experience or a similar capacity, and to competence in international law with reference to extensive professional legal capacity of relevance to the judicial work of the court. Any doubt as to whether these were meant to be cumulative or alternative requirements were dispelled by the final version of Article 36 of the Rome Statute, which inserted the word 'or' between them[14].

It is unclear by what method or on what grounds "established competence" is determined (see also marginal no. 10 below on the advisory committee), not least since paragraph 4(a) *in fine* requires States Parties to explain how nominees meet the respective criteria. Neither the Statute nor the Rules or Regulations provide any further explanations[15]. The distinction between criminal practice experience and competence in international law continues to be unhelpful in this context. Even after over 20 years of modern international criminal justice since the inception of the ICTY, a domestic criminal judge can learn most of what needs to be known about the development of international humanitarian/criminal law in an intensive short course and fill any remaining lacunae by reading the relevant materials in preparation of an individual case[16]. However, 20 years of criminal judicial and case management experience can only be gained through undergoing 20 years of criminal judicial and case management experience. Countries with career judiciaries usually assign new judges to dockets where their lack of experience will do the least damage, or place them in collegiate panels where they can learn from more experienced colleagues. Countries without a career judiciary require a certain minimum professional experience in the law before they appoint to the bench, although the picture is more blurred there[17]. This sensible approach should not be abandoned merely because the post is outside the national judiciary; it is moreover doubtful whether any State Party would favour such an approach in its own national judiciary. It seems particularly questionable when candidates without *any* prior experience as a judge, prosecutor or defence counsel in national or international trials are immediately appointed to an influential Appeals Chamber seat, as happened with one particular example at the ICTY.[18] 5

[14] It is, however, noticeable that in the recent practice of nominations to the international judiciary, emphasis is de facto increasingly placed on judicial experience as the main controlling aspect for selection, a development which is to be welcomed. See also for a critique Ambos, (2012) 23 CRIM L. FORUM 223.

[15] Other commentaries on the ICC Statute are silent on the matter: Jones, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court – A Commentary*, Vol. I, (2002) 242. – Ingadottir, *The International Criminal Court: Recommendations on Policy and Practice* (2003) at 153 – 155 gives a slightly more detailed picture but nothing expounding on the substance of the qualifications. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 530 *et seq.* does not expand on the matter, either, but states (at 530) that "the concerns of most delegations were ensuring geographic representation and experience from the major legal systems rather than the professionalism of the individuals making up the Court".

[16] Similarly, Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532 finds that the experience of international criminal tribunals has shown that international law questions were much less frequently relevant than the emphasis in the negotiation stages may have suggested.

[17] See Bohlander, in: *id.* (ed.), *International Criminal Justice - A Critical Analysis of Institutions and Procedures* (2007) at 357 – 362.

[18] See ICTY press release of Friday, 23 November 2001 - CVO/P.I.S./639e. - Every appellate judge should have undergone sufficient trial experience, not least in order to avoid unrealistic expectations towards the trial judges on whose decisions the judge is to rule on appeal.

In October 2011, the International Bar Association's Human Rights Institute passed a resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals[19] which under No. 3 stresses the cumulative criterion of professional experience[20]. 6

The question of command of languages has been another issue at all tribunals and courts established after 1993.While all judges have a command of either English or French, one finds that English is by far the most common language spoken by judges. Recent research on all 35 ICC judges who took office since 2002 has shown that all 35 spoke English, yet a mere 22 spoke French. Overall, English made up for 37.6% of all the languages represented among the judiciary and was at the same time the only language which achieved 100% coverage across the entire judiciary. French accounted for 23.7%, Spanish for 8.6%, German for 7.5%, Russian for 4.3%, Italian for 3.2%, Dutch, Japanese and Kiswahili for 2.2% each and the remaining 14 native languages (1.1% each) for 15.4%. English was thus more than twice as frequent as the 14 languages represented only once each, it accounted for more than the sum of all other multiple languages except French. English and French together were roughly double the percentage of the other multiple languages and still about 15% above the sum of all other languages[21]. A previous study of ICTY judges disclosed a difference in multiple language capacity between judges from common law backgrounds on the one hand and civil law backgrounds on the other, with the latter on average being the more polyglot of the two[22]. 7

While the requirement of speaking one of the working languages[23] is primarily meant simply to ensure ease of internal communication between the judges and their staff (as well as to some extent with the parties' representatives), it is an undeniable that factual language preponderance will also have an impact on source access and collation in the context of the comparative research that is still necessary even at the ICC. This aspect of the judges' language command (and that of their legal assistants) has so far been under-researched. Neither the Statute, nor the Rules or Regulations make provision for ensuring that a sufficiently broad reservoir of languages exists in the working and in particular the research environment of the Court.

The age of the nominees was a contentious issue[24] for international criminal tribunals from the beginning but was never held to be an essential criterion. The Appeal Judgment of 20 February 2001 in *Prosecutor v Delalic et al*.set out the reasoning for the ICTY: 8

> "The intention of Article 13 must [ ] be to ensure [ ] that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications."[25]

In the challenge of Judge Baird's nomination by Radovan Karadzic, a three judge panel decided on 20 October 2009[26] that the motion based on the judge's age was unfounded:

---

[19] Online at www.ibanet.org/Article/Detail.aspx?ArticleUid=CA79763C-39CC-4B54-8174-DD247A894150 which also contains a link to the background paper.

[20] In an email of 18 November 2009 to the author (on file), former UN Legal Counsel Hans Corell provided the following view on the selection criteria for trial and appellate judges in general: "My own view on who should be elected judge of an international criminal court is very clearly expressed in the Proposal for an International War Crimes Tribunal for the Former Yugoslavia by the Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia of 9 February 1993. Needless to say, as former judge in my own country I feel very strongly about this. In our proposal we made a clear distinction between judges to be elected to serve on the Court of First Instance and the Court of Appeal." - The relevant articles in that proposal are 7(3) and 18(3). The full text can be found at www.havc.se/res/SelectedMaterial/19930209csceproposalwarcrimestribunal.pdf.

[21] Bohlander (2014) *Journal of International Criminal Justice* 491.

[22] Bohlander and Findlay (2002) 1 The Global Community: Yearbook of International Law and Jurisprudence 3.

[23] Interestingly, this is one of the areas where the Advisory Committee on nominations (ACN – see below at marginal no. 10) may have a salutary effect, especially when it comes to testing the breadth of a candidate's command of legal terminology. See e.g. the 2nd Report of the Advisory Committee on Nominations of Judges on the work of its second meeting of 29 October 2013 (ICC-ASP/12/47) (online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf) p. 6 para 18, where the ACN stated with regard to one of the candidates: "The Committee questioned whether the candidate's oral proficiency in English, one of the working languages of the Court, while sufficient for the purposes of the interview, met the high standard prescribed under article 36, paragraph 3(c), of the Rome Statute. The candidate told the Committee that his proficiency in French, the other working language of the Court, was limited." The candidate concerned was withdrawn by the nominating State Party on 21 Nov. 2013: "Election of a judge to fill a judicial vacancy of the International Criminal Court – Addendum – Withdrawal of candidature" (ICC-ASP/12/45/Add.1-Eng), available online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-45-Add.1-ENG.pdf.

[24] See Bohlander (2010) 1 Indian Yearbook of International Law and Policy 327.

[25] *Prosecutor v. Delalic et al*., Judgement, Case No. IT-976-21-A, of 20 February 2001 at para. 659. – Emphasis in the original.

[26] *Prosecutor v Radovan Karadzic*, Decision on motion to recuse Judge Baird and report to Judge Güney, Case No. IT-95-0518-PT, 20 October 2009

> "It is plain that the Statue does not limit the ability of Judges to serve at the Tribunal by virtue of age, nor does the Bench find any reason to read such a requirement into Article 13. Indeed, a clear distinction must be drawn between the qualifications referred to in Article 13 and technical requirements for judicial office. In particular, the qualities a person must possess to be trusted with the highest judicial offices in his or her country is a separate matter from the restrictions local legislation may impose with respect to the age until which a person may hold such office. Accordingly, the Bench finds the Motion to be without merit"[27].

For the ICC, the debate about the issue is evident from the history of Article 36 ICCS, which was previously Draft Article 37. Subsection 9 of the 1998 Preparatory Committee version read:

> "A judge may not be over the age of 65 at the time of election"[28].

Article 30(6) of the previous 1996 Zutphen Draft had read under 4.:

> "A judge may not be over the age of [61] [66] [65] [?] at the time of nomination. Judges shall retire at the age of [70] [75]"[29].

Similar references to age limits (appointment or retirement) can be found in the 1996 statements of some delegations of the Preparatory Committee, namely Algeria, Denmark, Egypt, Finland, France, Jordan, Kuwait, Libya, Qatar and Singapore[30]. The discussions at the 1998 Diplomatic Conference about subsection 9 of then Article 37 showed a mixed picture. The following table shows countries opting for an age limit and those against it.

Age limits at the 1998 Diplomatic Conference[31],

For age limit	Against age limit
Finland (214), Oman (218), Brunei Darussalam (220), Iraq (220), Mozambique[32] (221), Algeria (221)	Syria (209) Japan (210), Venezuela (210), Turkey (211), Qatar[33] (212), Senegal (213), Togo[34] (217), Chile (216), Kuwait (219)

Why the subsection was finally deleted in Article 36 ICCS is unclear[35].

C. Paragraph 4 – Nomination Procedure; Advisory Committee (ACN)

The nomination procedure is set out[36] in paragraph 4 and largely self-explanatory. The reference in paragraph 4(a)(ii) to the procedure for nominating candidates to the ICJ is to Art. 4 of the ICJ Statute. 9

Paragraph 4(c) empowers the ASP to establish an Advisory Committee on nominations (ACN). This committee was created only during the 11th session of the ASP from 14 – 22 Nov. 2012, over ten years after the coming into force of the Rome Statute[37]. The report of the working group on the ACN[38] is remarkable firstly insofar as it requested the Bureau and the President of the ASP to discourage States Parties from 10

[27] Ibid., at para 21.
[28] Bassiouni, *The Legislative History of the International Criminal Court*, Vol.2, (2005) 257.
[29] Ibid.,259.
[30] Ibid., 259 – 264.
[31] Numbers refer to pages in Bassiouni, *The Legislative History of the International Criminal Court*, Vol.3, (2005) – Table reproduced from Bohlander (2010) 1 Indian Yearbook of International Law and Policy 333.
[32] Mozambique supported "an age limit of 65 to encourage participation by younger people."
[33] Qatar made the condition „provided a judge was in good health at the time".
[34] Togo tied this to a term of office of five years, stating that „Age would then not be a problem."
[35] In an email of 12 November 2009 to the author, M Cherif Bassiouni stated: "I do remember this discussion but in the end there was no strong opinion in favor of an age limitation." Similarly, Hans Corell wrote on 10 November 2009: "In the cases where I had some influence myself, that is to say when I interviewed candidates to discuss with the Secretary-General for special courts, read the Special Court for Sierra Leone, I could of course consider this issue. However, when judges are proposed by countries directly for a vote by an assembly of States it is more difficult". - Both emails are on file with the author. Rwelamira, in: Lee (ed.), *The International Criminal Court – The making of the Rome Statute* (1999) 157 cites only the age of 65 and states that the idea was dropped because of lack of a coherent national or international practice.
[36] See also the supplementary resolutions by the Assembly of States Parties: Resolution ICC-ASP/1/Res.2, "Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court" and Resolution ICC-ASP/1/Res.3, "Procedure for the election of the judges for the International Criminal Court", both of 9 Sep. 2002, ICC-ASP/3/Res.6 "Procedure for the nomination and election of judges of the International Criminal Court", of 10 Sep 2004 and Resolution ICC-ASP/5/Res.5 "Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6", of 1 Feb. 2007 – all resolutions are available online at www.icc-cpi.int/en_menus/asp/resolutions/categoricallist/Pages/default.aspx under "Elections".
[37] See http://www.icc-cpi.int/en_menus/asp/elections/advisorycommitteenominations/Pages/election%20acn-%202012.aspx.
[38] Report of the Bureau Working Group on the Advisory Committee on Nominations (ICC-ASP/11/47) Online at www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-47-ENG.pdf.

campaigning for candidates for the ACN[39], and secondly, in that it put the two principal terms of reference given to it by the ASP, geographical representation, principal legal systems and gender diversity on the one hand and "established competence and experience in criminal or international law" on the other, in a clear selection hierarchy: Only candidates who fulfilled the second criterion could then be scrutinised under the first[40]. The Working Group concluded that "it would be important to have a balance between experts in international criminal law and public international law; between persons with a civil law and a common law background; between persons with academic, judicial and diplomatic backgrounds; and, insofar as possible given the status of nominations, between both genders"[41]. It also expressed its concern that it "was keenly conscious of the fact that some of the criteria contained in paragraph 2 of the terms of reference were difficult to assess and therefore subjective in nature. It was noted, for example, that it would be difficult to make a comparative assessment of candidates' eminence, once a certain threshold was crossed, or to compare the eminence of individuals with different professional backgrounds"[42]. The ACN itself has in the meantime recommended "suggested guidelines for the presentation of candidates for election as judge of the International Criminal Court"[43]; the ICC website now contains a model CV which nominating States Parties are encouraged to use[44].

D. Paragraphs 5 to 8 – Election procedure; gender balance

The election procedure follows the intricate and technical regulations in paragraphs 5 to 8. They have in practice been supplemented by detailed instructions from the Bureau of the ASP on the actual voting process[45]. 11

Since the Statute expressly uses the terms "male" and "female" in paragraph 8(3) without any reference to the phrase "within their context in society" as in Art. 7(3), it would seem that the reference here is only to the biological sex and it may therefore be questionable under the current law to require employing a wider gender-related interpretation in this context. The related discussion about the meaning of the term "gender" in the context of Art. 7(3) and the debate about sexual orientation would prima facie appear to be irrelevant with regard to judicial elections[46]. The voting record of the ASP in this context is, however, so far not indicative of any discernible bias in any event: Judge Adrian Fulford from the UK, who has always been open about his homosexuality, was classified simply as "male" and was elected for a term of nine years in the first election in Feb. 2003[47], in the 9th round with two votes more (59) than the two-third majority required (57 out of 85)[48]. In the other rounds, other judges were elected with 56 to 65 votes, but mostly with fewer than 60[49]; voting went into 33 rounds at the time, so he seems to have been either uncontroversial or it may have simply been the numerical relation between the majority who had no such concerns, and the critical minority. 12

E. Paragraphs 9 and 10 – Term of office; continuation in office

Paragraph 9(b) and (c) are now obsolete, as they refer to the first election; all judges eligible at the time went into their second term, if they were re-elected[50]. The 1994 ILC Draft Statute provided for a term of 12 years, which, however, met with opposition and was reduced to nine years, in line with the term of the judges of the International Court of Justice. Lots were drawn at the first election to determine who would receive a term of 13

[39] Ibid., at para 10.
[40] Ibid., at paras. 7 – 8.
[41] Ibid., at para 15.
[42] Ibid., at para 12.
[43] Report of the Advisory Committee on Nominations of Judges on the work of its second meeting, of 29 Oct. 2013 (ICC-ASP/12/47) (online at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf) at p. 8.
[44] Online at www.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/FORM-Judges-CV-ENG.doc.
[45] See the guidance for the 2014 elections at http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-NV-13-SP-06-ENG.pdf, and Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 532.
[46] Yet, despite the fact that such a case may appear academic at the moment, even this restrictive interpretation of the Statute could on the face of it include judicial candidates who have undergone a sex change operation. That such cases and hence the potential for candidates are not unimaginable at the highest courts of a country is evidenced by the recent sex change of Jürgen Schmidt-Räntsch, now called Johanna Schmidt-Räntsch, a judge at the German Federal Court of Justice; see www.welt.de/politik/deutschland/article129468131/Bundesrichter-laesst-sich-zur-Frau-umwandeln.html and www.lto.de/recht/nachrichten/n/bgh-richter-schmidt-raentsch-geschlechtsumwandlung/ (links courtesy of Stephan Glantz). Obviously, nothing stops the ASP from taking sexual orientation as part of the commitment to gender diversity in general into account in elections. Given the reluctance of a large minority of states to countenance, leave alone respect, sexual orientation and LGBT rights in general with regard to Art. 7(3), it is unclear whether this would currently be acceptable to them in the nomination and election context. See for that debate Bohlander, M, Criminalising LGBT persons under national criminal law and Article 7(1)(h) and (3) of the ICC Statute (2014) Global Policy (forthcoming – early view DOI: 10.1111/1758-5899.12136).
[47] See http://legal.un.org/icc/elections/judges/fulford/fulford.htm.
[48] Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, First session (first and second resumptions), New York, 3–7 Feb. and 21–23 Apr. 2003 (ICC-ASP/1/3/Add.1); available online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/341/37/PDF/N0334137.pdf.
[49] Ibid., at paras. 15 – 26. The 56-vote elections were due to two invalid votes in the respective round.
[50] See for the election history until 2013 the overview at http://www.icc-cpi.int/iccdocs/asp_docs/Elections/ICC-Election-Judges-History-July-2013-ENG.pdf.

three or six years[51].
ICC Reg. 9(1) states that "[t]he term of office of judges shall commence on the eleventh of March following the date of their election", which followed from the determination made by the ASP at the 6th meeting on 3 February 2003: "[T]he Assembly, on the recommendation of the Bureau, decided that the terms of office of judges … elected by the Assembly shall begin to run as from the 11 March following the date of the election. The Assembly also decided that the term of office of a judge elected[52] to replace a judge whose term of office has not expired shall run from the date of the election for the remainder of that term"[53]. The latter was then enshrined in ICC Reg. 9(2).

Paragraph 10 allows judges who have part-heard a case to continue in office until the termination of the proceedings in which they have been involved, a procedure that makes sense pragmatically and is actually required by the principle that only judges may decide a case who have seen and heard all the evidence. This can lead to quite dramatic extensions, as, for example, in the case of Judge Blattman, who sat on the Trial Chamber in the *Lubanga* case. Judge Blattman had been elected in Feb. 2003 and his term of office, beginning on 11 Mar. 2003, had been decided by lot as running for six years; he was thus not eligible for re-election. This meant that he should have stepped down on 10 Mar. 2009. Judges Fulford and Odio-Benito had been elected for nine years and should have stepped down on 10 Mar. 2012. However, they were still sitting on 7 Aug. 2012 in the decision on reparation proceedings[54] when the Chamber decided that the present judges no longer needed to remain seized of overseeing the reparation proceedings managed by the Trust Fund for Victims, and that a differently constituted Chamber could perform that task[55]. 14

[51] Ibid. (fn. 47) at paras. 27 – 30.
[52] Pursuant to Art. 37.
[53] Ibid. (fn. 47), at para 31.
[54] *Prosecutor v Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, of 7 August 2012, available online at www.icc-cpi.int/iccdocs/doc/doc1447971.pdf .
[55] Ibid. at paras. 260 – 261.